

October 30, 2008

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Judy A. Meyer

Date of Filing: September 19, 2008

Case Number: TFA-0275

On September 19, 2008, Judy A. Meyer filed an Appeal from a determination issued to her by the Department of Energy's (DOE) Office of Legacy Management (OLM). In that determination, OLM responded to a request for information that Ms. Meyer filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require OLM to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On July 31, 2008, Ms. Meyer submitted a FOIA request to the FOIA and Privacy Act Office at DOE Headquarters (DOE/FOIA), for a "copy of the Radiation Dose Report, Training Records and Employment Records" of her deceased husband, Gary Lee Meyer, who worked at the Fernald Site from January 1993 to August 1993. *See* Routine Employee Record Request from Judy A. Meyer (August 4, 2008) (FOIA Request). DOE/FOIA forwarded the request to OLM because any document responsive to the request, if it existed, would fall under the jurisdiction of that office. *See* Letter from Verlette L. Gatlin, Deputy Director, DOE/FOIA to Judy A. Meyer (July 31, 2008).

OLM conducted a search of its records and located and released copies of Mr. Meyer's medical, radiological, and training records but were unable to locate Mr. Meyer's employment file. *See* Letter from John V. Montgomery, Freedom of Information Officer, OLM, to Judy A. Meyer (August 18, 2008) (Determination Letter). On September 19, 2008, the Office of Hearings and Appeals (OHA) received Ms. Meyer's Appeal in which she requested an additional search for her husband's employment records. *See* Letter from Judy Meyer to OHA (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't*

of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).¹

In reviewing this Appeal, we contacted OLM to ascertain the scope of its search for responsive documents. *See* Email from Avery Webster, Attorney-Examiner, OHA, to John Montgomery, Freedom of Information Officer, OLM (September 22, 2008). OLM informed us that it conducted a thorough search of the records database² using Mr. Meyer's name and social security number and located copies of Mr. Meyer's medical,³ radiological, and training records, but not his employment records. *See* September Email.

According to OLM records, Mr. Meyer's files indicated that he worked at the Fernald Site⁴ under a subcontract to either Lockheed Martin Environmental or Rust Engineering.⁵ *Id.* At the Fernald Site, subcontractor records which related to site operations such as medical, radiological and training were maintained as Federal records. *See* October 8, 2008, Email. Records relating to employment such as personnel and benefits were maintained and retained by the subcontractor. *Id.* In this instance, it is unlikely that subcontractor employee records would have been designated as government-owned records. *See* October 22, 2008, Email. Thus, the Fernald Site would not have kept a personnel file or employment records for Mr. Meyer.⁶ *See* October 8, 2008, Email. Those records would have been maintained by the company that he worked for, in this case either Lockheed Martin Environmental or Rust Engineering.⁷ *Id.*

¹ All OHA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

² The electronic records database contains a listing of all government records which have been archived from the Fernald site, as well as other Legacy Management sites, to Federal Records Centers. *See* Email from John Montgomery, AIM Team Leader, OLM, to Avery Webster, Attorney-Examiner, OHA (September 23, 2008) (September Email).

³ OLM did not provide a copy of Mr. Meyer's medical file because it was not requested in Ms. Meyer's July 31, 2008, FOIA request.

⁴ In the case of Fernald and many other DOE sites, the Management and Operating contracts were awarded to a large private-sector Prime contractor with Federal Government oversight. In these environments, the Prime contractor employed many smaller subcontractors (e.g. Lockheed Martin Environmental and Rust Engineering) to accomplish specific or routine tasks. The Prime contractor at the Fernald Site during 1993 was Fluor Corporation (the original request states Mr. Meyer worked at Fernald from January 1993 to August 1993). *See* Email from John Montgomery, AIM Team Leader, OLM, to Avery Webster, Attorney-Examiner, OHA (October 8, 2008) (October 8, 2008, Email).

⁵ Generally, in DOE contracts there is an ownership of records clause that defines government-owned and contractor-owned records. *See* Email from John Montgomery, AIM Team Leader, OLM, to Avery Webster, Attorney-Examiner, OHA (October 22, 2008) (October 22, 2008, Email). OLM conducted a complete and thorough search of relevant documents at the National Archives and could not locate the contracts that would specify ownership of either Lockheed Martin Environmental or Rust Engineering's employment records. *Id.*

⁶ According to OLM, the only location where the subcontractor's employment records would exist is within that company. *See* October 22, 2008, Email.

⁷ Mrs. Meyer may consider contacting Lockheed Martin Environmental or Rust Engineering to request a copy of Mr. Meyer's employment records.

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request must “conduct a search reasonably calculated to uncover all relevant documents.” Based on the foregoing, we find that OLM performed a search reasonably calculated to reveal documents responsive to Ms. Meyer’s request. Accordingly, the search was adequate under the FOIA and, therefore, Ms. Meyer’s appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Ms. Judy A. Meyer on September 19, 2008, OHA Case No. TFA-0275, is hereby denied.
- (2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 30, 2008